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No._____

Supreme Court of the United States

October Term, 1997

Nick Parrino, as Administrator of the Estate of Stephen Frank Parrino, Deceased, and successor to Steve Parrino, D.C.,

Petitioner,

-v-

FHP, Inc., a California corporation; FHP Healthcare, a Califoria corporation, aka FHP Value Plan; FHP Administrators, a Division of Ultralink, Inc., a California corporation; Friendly Hills Healthcare Network, a California non- profit corporation, dba Friendly Hills Regional Medical Center; Friendly Hills Medical Group, a general partnership; Friendly Hills Regional Medical Center Guild, Inc., a California nonprofit corporation, Rem Almirante, M.D., an individual; Jeffrey Wolf, M.D., an individual,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented For Review

A. Does ERISA Preempt State Common Law Claims for Fraud in the Inducement Based upon Precontractual False and Misleading Marketing and Sales Practices by Health Maintenance Organizations?

B. Does the Tenth Amendment Allow ERISA to Preempt the California State Police Power Tort of Commercial Blockade Which Was Enacted to Protect Fundamental Rights Guaranteed Under California's State Constitution and Which Exist Independent of Any Contractual Relationship?

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Citations Of Opinions And Orders

The opinion of the United States Court of Appeals for the Ninth Circuit in the matter of *Nick Parrino, as Administrator of the Estate of Stephen Frank Parrino, Deceased, and successor to Steve Parrino, D.C., Plaintiff-Appellant, v. FHP, Inc., a California corporation; FHP Healthcare, a Califoria corporation, aka FHP Value Plan; FHP Administrators, a Division of Ultralink, Inc., a California corporation; Friendly Hills Healthcare Network, a California non-profit corporation, dba Friendly Hills Regional Medical Center; Friendly Hills Medical Group, a general partnership; Friendly Hills Regional Medical Center Guild, Inc., a California non-profit corporation, Rem Almirante, M.D., an individual; Jeffrey Wolf, M.D., an individual, Defendants-Appellees*, 146 F.3d 699 [9th Cir. 1998] is set forth in Appendix, p. 1a.

The Orders of the United States District Court for the Central District of California are set forth in Appendix ___.

Basis For Jurisdiction In This Court

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 12, 1998.

There has been no order requesting rehearing or granting an extension of time to file the petition for a writ of certiorari.

This Court has jurisdiction to review the judgment in question on a writ of certiorari pursuant to 28 U.S.C. §1254.

28 U.S.C. §2403(a) may apply, in that Petitioner contends the ERISA statute was unconstitutionally applied to the facts averred in the Complaints. The Ninth Circuit did not, pursuant to 28 U.S.C. §2403(a), certify to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question. This Petition has been served on the Solicitor General of the United States, pursuant to Rule 29.4(b) and Rule 14.1(e)(v) of this Court. Rule 29.4(c) of this Court does not apply.

Statutes In Question

The federal statutes involved are 29 U.S.C. §1132(a)(1)(B) and §1144(a), which are set out verbatim in Appendix, ___. This case also involves a series of California State police power statutes, which all secure California's constitutional recognition of healthcare as being a fundamental right. These California State statutes include *Civil Code* §3427, *Penal Code* §602.11,

Business and Professions Code §145, *Business and Professions Code* §510, *Health and Safety Code* §1360, *Welfare and Institutions Code* §14409. These statutes are set out verbatim in Appendix, ___.

Statement Of The Case

Steve Parrino, D.C. ("Dr. Parrino"), a thirty-three year old chiropractor, was induced by fraud and misrepresentation to join an HMO group health plan founded upon a draconian cost containment program which, by its terms, mandated undertreatment when specialized care was required to address emergent medical conditions. Among other things, the foreseeable costs of proton beam therapy, and other forms of necessary care, were not included in the coverages afforded by this defectively designed group health plan. Respondents did not disclose the defective cost containment program to the HMO's subscribers, and in order to induce Dr. Parrino to join the HMO, falsely represented it would arrange for and thereby "deliver high-quality, personalized care" because "the heart of an HMO is prevention." The HMO and its agents made these representations, while also suppressing crucial information concerning the cost containment program and the group health plan.

Well after Dr. Parrino had joined the HMO, Respondents intentionally interfered with Dr. Parrino's access to medical treatment.

Dr. Parrino filed this Action in California State Court, asserting California State police power statutory and common law claims. He died two days later as a result of having relied on Respondents' misrepresentations which had induced him to join the HMO. Respondents removed the Action to federal court and Petitioner Nick Parrino (Dr. Parrino's administrator and father) filed a Motion for Remand which was denied by the District Court.

The United States Court of Appeals for the Ninth Circuit affirmed the District Court on June 12, 1998, and amended its Opinion on July 28, 1998. The Ninth Circuit held that the Employee Retirement Income Security Act of 1974 ("ERISA") completely preempts each cause of action asserted in the Complaint, including those for fraud in the inducement and statutory Commercial Blockade.

Both the District Court and the Ninth Circuit determined that the basis for federal jurisdiction in the District Court for the Central District of California, the federal court of first instance, was 29 U.S.C. §1132(a)(1)(B).

Argument In Support Of Petition

Our system of government is founded upon a separation of powers between the federal government and the states. Cases involving the preemptive effect of the Employee Retirement Income Security Act ("ERISA") often present a challenge in that they require the federal courts to respect the historic police powers of

the state, which include the regulation of matters of health and safety, while giving effect to appropriate congressional intent. Unfortunately, the federal government and federal courts are beginning to be looked at as interfering with the historic police powers of the states and the liberty of their citizens. This is exemplified by recent anti-HMO/ERISA movements among the people and their elected representatives; including in California and Texas.

Mindful of these issues, "(t)he boundaries of ERISA's pre-emptive reach have been the focus of considerable attention from this Court." (*DeBuono v. NYSA-IL Medical and Clinical Services Fund*, 520 U.S. 806, 107 S.Ct. 1747, 138 L.Ed. 2d 21 n. 1 [1997].)

This case presents two distinct issues regarding the scope of ERISA preemption which have never been decided by this Court. The federal questions here involved are of considerable importance, and, in light of the *Parrino* opinion, the Circuits are now split.

As three Circuit Court of Appeals have determined, fraud in the inducement claims such as those asserted by Dr. Parrino arise independent of any ERISA plan and may not be preempted. Without addressing this contrary authority, the Ninth Circuit has stated in its published Opinion that fraud in the inducement claims such as asserted by Dr. Parrino are preempted by ERISA.

Review should be granted to resolve a split amongst the Circuits as to whether ERISA preempts whether precontractual advertising torts such as fraud in the inducement, especially where, as in California, the

state has exercised its police power authority to regulate the manner in which HMO's sell health insurance.

In an issue of first impression, the Ninth Circuit has determined that ERISA preempted Dr. Parrino's claims under California's police power statute (Commercial Blockade), which was recently enacted to secure to every California citizen the fundamental right to healthcare afforded by the California Constitution.

Healthcare in California is a "basic and fundamental right." The California Legislature exercised its police powers in enacting the statutory tort of Commercial Blockade as a method of protecting that fundamental right. The Tenth Amendment prohibits an inferior federal statute from preempting a state constitutional right and ERISA accordingly does not preempt the Commercial Blockade cause of action.

California's statutory tort of Commercial Blockade based upon physical obstruction of another's access to health care facilities or interference with the normal operation of these facilities does not require, and hence does not relate to, the administration of or arise from, the existence of any ERISA contract. Commercial Blockade applies equally to the public at large.

The Ninth Circuit's expansive interpretation of ERISA preemption violates the State's traditional police powers and is inconsistent with fundamental principles of statutory construction, as well as contrary to Congressional intent and binding precedent.

This Court Should Grant Certiorari to Settle Whether Or Not ERISA Preempts Common Law Claims for Fraud in the Inducement Based upon Pre- Contractual

Fraudulent Sales and Marketing Practices by the Health Maintenance Organizations.

ERISA preemption derives from 29 U.S.C. §1144(a) which covers "any and all state laws insofar as they now or hereafter relate to any employee benefit plan."

"Consideration of issues arising under the Supremacy Clause start with the assumption that the historic police powers of the states [are] not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress." (*California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316 117 S.Ct. 832, 838, 136 L.Ed.2d 791 [1997], citing *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Company, ("Travelers")* 514 U.S. 645, 117 S.Ct. 1671, 1676, 131 L.Ed.2d 695 [1995]; *Cipollene v. Liggett Group, Inc.*, 505 U.S. 504, 517-519, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 [1992], *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 [1947].) Whether a certain state action is preempted by federal law is one of Congressional intent and "the 'ultimate touchstone' in determining preemption is the Congressional purpose in enacting ERISA." (*Hospice of Metro Denver, Inc. v. Group Health Insurance of Oklahoma*, 944 F.2d 752 [10th Cir. 1991]; *Dillingham Construction, supra*, 117 S.Ct. at 837)

As recently reaffirmed by this Court, "The historic police powers of the State include the regulation of matters of health and safety." (*DeBuono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806, 117 S.Ct. 1747, 1751-1752, 138 L.Ed.2d 21 [1997]) Because

laws that target "the health care industry" operate in a field that has been traditionally occupied by the State, a defendant asserting ERISA preemption will "bear the considerable burden of overcoming 'the starting presumption that Congress does not intend to supplant State law.'" (*Ibid.*, quoting *Travelers, supra*, 514 U.S. at 654, 115 S.Ct. at 1676.) As confirmed by this Court, "nothing in the (ERISA) or its history indicated the Congress chose to displace general health care regulation, which has always been a matter of local concern." (*Travelers*, 115 S.Ct. at 1679, [emphasis added] citing *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719, 105 S.Ct. 2371, 185 L.Ed.2d 714 [1985]).

In enacting ERISA's preemption provision it was Congress' intent "to protect contractually defined benefits." (*Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148, 105 S.Ct. 3085, 3093 [1985]) For these reasons, ERISA can preempt *only* those state claims which arise out of plan (i.e., contract) administration or which "impinge on the functioning" of an ERISA plan. (*Ethridge v. Harbor Restaurant* 861 F.2d 1389, 1404 [9th Cir. 1988]) [1]

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[1] For example, claims for breach of the implied covenant of good faith and fair dealing are preempted by ERISA. (*Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 [1987]; *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S. Ct. 1542, 95 L.Ed.2d 55 [1987]) The implied covenant is a state law exception to the general rule that breach of contract does not give rise to tort remedies, and that the implied covenant by its very nature is based upon a dispute over the administration of contractual benefits, hence a subject matter preempted by ERISA.

In *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739- 745, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985), this Court confirmed that state mandated minimum levels of certain types of coverages were not preempted by ERISA because they represented an exercise of state police power to regulate insurance which was preserved by the insurance savings clause of 29 U.S.C. §1144(b)(2)(A). The court "presume(d) that Congress did not intend to preempt areas of traditional state regulation." (471 U.S. at 740)

Metropolitan Life further confirms that claims involving false and misleading marketing and sales practices cannot be preempted by ERISA. Delimiting the scope of ERISA's §514(a), this Court plainly stated that laws that regulate "the way the insurer [ERISA plan] may sell insurance, do not 'relate to' benefit plans in the first instance." (471 U.S. at 740). Accordingly, "they would not be preempted by §514(a) . . . ." (*Ibid.*)

Notwithstanding this plain pronouncement, the Ninth Circuit's *Parrino* opinion states that fraud in the inducement claims are preempted by ERISA. Accordingly, there is a split between the Circuits as to whether state law fraud in the inducement claims which arise precontract, i.e. before enrollment in an ERISA plan, are preempted.

In *Perry v. P.I.E. Nationwide, Inc.*, 872 F.2d 157 [6th Cir. 1989], *cert. denied*, 493 U.S. 1093, 110 S.Ct. 1166 [1990] the Sixth Circuit held that ERISA did not preempt state law fraud claims by employees alleging that their employer's misrepresentations regarding plan benefits induced them to join the plan. In *Perry*, the alleged misconduct occurred before Plaintiff had

formalized his relationship with the ERISA plan and there was no allegation that the ERISA plan was mismanaged or improperly administered.

In *Perkins v. Time Insurance Co.* 898 F.2d 470 (5th Cir. 1990), the Fifth Circuit similarly held that ERISA does *not* preempt state law claims based upon misrepresentation of benefits contained in a proposed plan which induced a plaintiff to leave his current plan for the new ERISA plan. In *Perkins*, the plaintiff owned a small company which maintained employee health insurance with a different ERISA healthcare plan provider. The Fifth Circuit concluded "that a claim that an insurance agent fraudulently induced an insured to surrender coverage under an existing plan, to participate in an ERISA plan which did not provide the promised coverage, 'relates to' that plan only indirectly [and therefore is not preempted]." (*Id.* at 473.)

The Eleventh Circuit, sitting *en banc*, has followed *Perry* and *Perkins* in recognizing that state law claims based upon wrongful precontractual inducement to join a healthcare plan are *not* preempted by ERISA. (Morstein v. National Ins. Services, Inc., 93 F.3d 715 [11th Cir. 1996].)

Finally, the Fourth Circuit has also recognized that state law claims provide a remedy not preempted by ERISA where a consumer sustains a loss when an ERISA plan does not provide the benefits promised by the marketer of the plan. (*Coyne & Delany Co. v. Selman*, 98 F.3d 1457 [4th Cir. 1996] - state law claim for wrongful inducement to enter into an ERISA plan may be pursued.)

California *Health & Safety Code* §1360 makes it unlawful to use untrue or misleading advertising solicitations to obtain enrollment in a health care service plan.[2] Under California Welfare & Institutions Code §14409, it is unlawful to misrepresent the terms of a health care plan (see *also Penal Code*, §602.11). These are all police power statutes which regulate the manner in which insurance may be sold and which are not "relate(d) to" benefit plans with the meaning of §514(a). (*Metropolitan Life Insurance Company*, 471 U.S. at 741).

In any event, claims for fraud in the inducement do not relate to contract *performances*. Whether the performance of contractual obligations comply with, or breach, that contract is irrelevant to whether the terms of that contract do "not provide the benefits promised" pre-contractually.

Prior to the *Parrino* decision, the Ninth Circuit had held that state law claims arising out of an insurer's alleged misrepresentation concerning whether patients were covered by a group policy was not preempted by ERISA. (*The Meadows v. Employers Health Insurance*, 47 F.3d 1006 [9th Cir., 1995]). This holding was based in part on *Martin v. Pate*, 749 F.Supp. 242, 246 (S.D.Ala. 1990), affirmed, 934 F.2d 1265 (11th Cir., 1991) which held that an "employee may maintain (a) state action for fraud because (b) misrepresentations occurred before

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[2] California *Health & Safety Code* §1360(a)(2) prohibits deceptive advertising by any managed care corporation regulated by the California Department of Corporations. This statute has been limited to pre-contractual solicitation, such as what occurred here, and has been held not to apply to current subscribers. (*Samura v. Kaiser Foundation Health Plan, Inc.*, 17 Cal.App.4th 1284, 22 Cal.Rptr. 20 [1993])

(the employee) became a beneficiary under (a) ERISA plan." (47 F.3d at 1009-1010).

In this case, the Ninth Circuit approached this important by begging the question. Thus, the Ninth Circuit conclusorily mischaracterized Dr. Parrino's fraud in the inducement claim as "rest(ing) on his membership in FHP's plan and on the terms of the plan," and stated that Dr. Parrino's Complaint "necessarily relies" on that plan. The Ninth Circuit also stated Dr. Parrino's cause of action for fraud in the inducement as being "based upon the defendants' failure to disclose the alleged defects in their claims processing system."[3]

In so describing Dr. Parrino's fraud in the inducement claim, and then upholding its dismissal without further analysis, the Ninth Circuit begged the essential question three other circuits have resolved differently, and also disregarded this Court's statements in *Metropolitan Life*, 471 U.S. at 470.

The Parrino decision therefore conflicts with prior Ninth Circuit precedent, as well as other circuits.

Since precontract torts relate to the manner in which a defendant procured a plaintiff's involvement in a plan, rather than to the administration of the plan or to benefits under the plan, common law causes of action arising out of such conduct are not preempted by

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[3] Dr. Parrino's Complaint alleged that respondents affirmatively misrepresented the scope of coverage available under the Plan. In any event, Dr. Parrino's pre-contractual fraud in the inducement claim was not premised on the existence of an ERISA plan, nor was the existence of such a plan essential to his fraud in the inducement claim. As at least three other circuits have held, fraud in the inducement claims such as Dr. Parrino's do not "relate to" ERISA plans within the meaning of §514(a).

ERISA. (*Perry v. P.I.E Nationwide Inc., supra,* 872 F.2d at 159).

The Complaint alleges pre-contract wrongs, including the intentional suppression of crucial information which induced Dr. Parrino to join Respondents' plan. Actionable harm occurred to Dr. Parrino at such time as he initially joined FHP based upon false pretenses and long before any request for services was made. Contrary to the Ninth Circuit's ruling, Dr. Parrino's claims are not based on any medical service contract, but rather based on misrepresentations which occurred before he contracted with FHP. Such claims are not preempted by ERISA.

This Court has recognized that the preemptive effect of ERISA will be circumscribed in those cases where a state law relates to ERISA in "too tenuous, remote or peripheral manner to warrant a finding that [it] relates to the plan." (*Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100, fn. 21, 103 S.Ct. 2890, 77 L.Ed.2d 490 [1983]). Thus, "lawsuits against ERISA plans for run-of-the-mill claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan," are examples of causes of action that will not be preempted. (*Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 831, 108 S.Ct. 2182, 100 L.Ed.2d 836 [1988]).

In *New York State Conference of Blue Cross v. Travelers Insurance Company*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 [1995] ("*Travelers*"), this Court held that ERISA did not preempt a New York law requiring hospitals to add "surcharges on bills of patients whose commercial insurance coverage was purchased by employee health care plans governed by ERISA, and

[requiring] . . . surcharges on HMOs, insofar as their membership fees are paid by an ERISA plan." This "Court reaffirmed that even a preemption provision in an expansive statutory scheme such as ERISA must be read narrowly, especially in areas of historic state concern such as health and safety" (115 S.Ct. at 1679).

As the Ninth Circuit acknowledged here, *Travelers* held, "it would be unreasonable to delimit the scope of ERISA preemption by reading section 514 too literally":

> "If 'relate to' 'were taken to extend to the further stretch of its indeterminacy, then for all practice purposes preemption would never run its course, for [r]eally, universally, relations stop nowhere'."

(*Parrino v. FHP, Inc.*, 146 F.3d 699 [9th Cir., 1998], quoting *Travelers*, 115 S.Ct. at 1677 (citations omitted).)

Accordingly, "(I)n order to define 'relate to' in a meaningful manner, the Court must look to the purpose and effects of the state law in issue." (*Travelers*, 115 S.Ct. At 1677, *DeBuono* 117 S.Ct. at 1751). Contrary to these teachings, the Ninth Circuit did not correctly address the purpose and effects of the state laws in issue.

Dr. Parrino's fraud in the inducement claim is even more unrelated to an ERISA plan than the surcharges held not preempted by this Court in *Travelers*. First, this claim is a laws of general applicability, as were the surcharges in *Travelers*. Second, this claims exist within the traditional police powers of the state. Third,

this claim is imposed regardless of whether an ERISA plan is at issue. Fourth, this claim does not mandate employee benefit structures or their administration, nor can arguably be characterized as an attempt to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers. Likewise, this claim did not disrupt a uniform administration, practice or provision of a health benefit plan. Finally, this claim at most, would place an indirect economic effect on the alleged ERISA plan such as quality standards or basic regulations in precontractual advertising, best left to state police powers.

The Ninth Circuit's expansive interpretation of Section 514 is contrary to this Court's prior pronouncement that, "[p]reemption does not occur . . . if the state law has only a tenuous, remote, or peripheral connection with the covered plans, as is the case with many laws of general applicability." (*District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125,113 S.Ct. 580, 583, 121 L.Ed.2d 513, n.1 [1992].)

As the Seventh Circuit held in *Rice v. Panchal*, 65 F.3d 637 (7th Cir., 1995), an employee's action against a healthcare plan administrator under state law is not subject to complete preemption where the suit is not "within the scope of Section 502(a)(1)(B) as a suit 'to enforce his rights under the plan.'" (65 F.3d at 642, citing to 29 U.S.C. §1132(a)(1)(B).) Like Dr. Parrino, the *Rice* plaintiff did not predicate his claims for liability based upon the "terms of the ERISA plan." [*Ibid.*][4]

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[4] "For starters, *Rice* does not claim that he did not receive the benefits due to him under the plan, which are payments of the cost of medical services, not the medical services themselves. He does not claim that

Similarly, in *Roessert v. HealthNet*, 929 F.Supp. 343 [N.D. Ca. 1996], a complaint which challenged the medical decisions made by health care providers in connection with an ERISA plan was not preempted, and thus not removable to federal court. The Court held, "(i)n deciding whether state law claims come within the scope of §502(a), and are therefore completely preempted by ERISA, the court must consider whether the claims are "to recover benefits due . . . under the terms of the plan, to enforce . . . rights under terms of the plan, or to clarify rights to future benefits under the terms of the plan." (929 F.Supp. at 349); *see Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350 [3d Cir. 1995], *Cert denied*, 116 S.Ct. 564)

As in this case, the *Roessert* plaintiffs "made no claim for benefits or enforcement of rights under the plan that would bring the action within the ambit of §502 . . . [N]othing in plaintiffs' complaint implicates HealthNet's role as an administrator, but only as a provider of medical treatment. Likewise, there (is) no right under the plan that is implicated by plaintiffs' claim." (929 F.Supp. at 350-351). This case does not involve an "interpretation of contract terms" and, consequently, there is "no complete preemption" under ERISA. (*Rice, supra.* 65 F.3d 642-643.) The pre- contractual tortious misconduct which damaged Dr. Parrino and resulted in

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the plan guarantees that Prudential Healthcare Providers would provide malpractice-- free medical care or that the plan provides coverage for injuries caused by medical malpractice. Nor does *Rice* claim that Prudential was negligent when it selected Sotillo to be a Prudential Healthcare Provider and held Sotillo out as such. . . In fact, *Rice* has repeatedly denied that his claim against Prudential rests upon any express or implied term of the plan." (65 F.3d at 632)

this action "does not require interpretation of the plan, [and therefore] there is no reason to believe that state resolution of the disputed medical decision would affect the important uniformity of federal ERISA law. Rather, it falls within the familiar purview of state tort law." (Ibid.)

Given this difference, and as observed by this Court in *Metropolitan Life, supra*, 471 U.S. at 740, "insurance companies are not immune from state regulation of their *sales and marketing practices* merely because the insurance products were sold to, or for the benefit of, ERISA plans... [¶] If ERISA preempted the state [wrongful inducement] claim..., employers (and presumably all others) would be immune from civil liability for fraudulently misrepresenting the terms or conditions of an ERISA plan to potential plan participants before the creation of the plan. This Court doubts that Congress intended to grant this immunity when it enacted ERISA". (*Camp v. Pacific Financial Group* , 956 F.Supp. 1541,1545 [C.D., Cal., 1997]).

The Tenth Amendment Prohibits the Inferior ERISA Federal Statute from Completely Preempting The State's Exercise Of Its Police Powers, Especially to Protect Fundamental State Constitutional Rights.

Healthcare in California is a fundamental and protected constitutional state right, and the Tenth Amendment prevents any federal preemption of California's exercise of its police power to protect this fundamental right.

Like all federal statutes, ERISA must necessarily be limited by the constitutional fact that "powers not delegated to the United States by the Constitution . . .

are reserved to the states . . . or to the people." (Tenth Amendment to the U.S. Constitution; *See also, Fry v. United States*, 421 U.S. 542, 547, 95 S.Ct. 1792, 44 L.Ed.2d 363 [fn 7] [1975].)

"Congress may not exercise power in a fashion that impairs the State's integrity . . ." This state power was first described as the police power in *Brown v. Maryland*, 12 Wheat. 419, 25 U.S. 419, 443-444, 6 L.Ed. 678 [1827]. The police power of a State embraces statutes designed to promote public safety, health, welfare and morals. (*Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L.Ed.2d 631 [1978].)

While police powers are reserved to the states under the Tenth Amendment, the United States Constitution grants to congress the "power... to regulate Commerce... among the several states... ". (Article I, §8, clause 3.) However, "although the commerce clause conferred on the national government power to regulate commerce, its possession of the power does not exclude all state power of regulation... there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." (*Southern Pacific Co. v. Arizona*, 325 U.S. 761, 766-767, 65 S. Ct. 1515, 89 L.Ed. 1915 [1945].)[5]

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[5] It has long been held that Congress may not use its commerce power to effectuate a violation of individual rights guaranteed by our Constitution. Clearly, the usual limitations of the Bill of Rights and of Article I §9 (Powers Denied to Congress) apply to Acts of Congress. (*See Adarand Contractors v. Pena*, 515 U.S. 200, 115 S.Ct. 2097, 2108 [1995]-remanding for review under strict scrutiny a provision of the Small Business Act as a violation of the equal protection component of the Due Process Clause.)

ERISA does not constitute a complete "preemption" of even a state's police power, including "general health care regulation which traditionally has been a matter of local concern." (*Travelers, supra*, 115 S. Ct. at 1679.)

ERISA has been held to preempt conflicting statutes. However, Dr. Parrino is aware of no case, until now, in which ERISA has been held to preempt a State police power statute enacted to protect a fundamental right guaranteed by a State Constitution. Such preemption is contrary to the Tenth Amendment. If there is an inconsistency between a Congressional Legislative enactment such as ERISA and a State Constitution, the Tenth Amendment requires that the state Constitution take priority. Put simply, under the Tenth Amendment, federal statutes are subservient to state constitutions.

In addition, state police powers under the Tenth Amendment of our Bill of Rights have been held not to be displaced by federal preemption if local conduct involves intimidation or violence, based upon the premise that regulation of offensive and violent conduct is traditionally left to local law. (*United Automobile Workers v. Wisconsin Employment Relations Board*, 351 U.S. 266, 76 S. Ct. 794, 100 L.Ed. 1162 [1956]; *Youngdahl v. Rainfair*, 355 U.S. 131, 78 S.Ct. 206, 2 L.Ed.2d 151 [1957]; *United Automobile Workers v. Russell*, 356 U.S. 634, 78 S. Ct. 932, 2 L.Ed.2d 1030 [1958]; *United Construction Workers v. Laburnum Construction Corporation*, 347 U.S. 656, 74 S. Ct. 833. 98 L.Ed. 1025 [1954].) If negative conduct touches interests "deeply rooted in local dealing", and if there exists a "significant state interest in protecting the citizens from the challenged conduct",

and if there exists "little risk of interference with the regulatory jurisdiction" of the federal agency, then state law is not preempted. (*San Diego Building Trades Council v. Garmon* 359 U.S. 236, 244, 79 S. Ct. 773, 3 L.Ed.2d 775 [1959].)

An example of such state police power is *Civil Code* §3427, the statutorily created tort claim of commercial blockade based upon the denial of access to health care. This statute is written broadly for the purpose of effectuating a state interest that controls the actions of all citizens, including, but not limited to, health maintenance organizations and their representatives. The California Legislature has recognized that wrongful denial of access to health care endangers the public and cannot be tolerated.

Since the Tenth Amendment prevents the inferior ERISA *statute* from preempting the superior California State *Constitution*, a civil action under the Commercial Blockade Act is an exercise of the state's police power to protect that fundamental right which may not be constitutionally interfered with through preemption. (See *Max Factor Co. v. Kunsman*, 5 Cal.2d 446, 55 P.2d 177, affirmed 299 U.S. 198, 57 S.Ct. 147 [1936] -- in exercise of its police powers, states are not limited by powers enumerated in the state's constitution.)

The California Legislature has recognized that health care is a fundamental right which it has embodied in California state statutes such as Civil Code §3427 et al, Penal Code §602.11[6], Business and Professions Code

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[6] A plain reading of the Commercial Blockade Act (California Civil Code §3427) clearly indicates the Legislature's intent to provide a civil remedy for violations of the same type of criminal conduct protected by

§145, and California Business and Professions Code §510. The California State Constitution Declaration of Rights expressly states that there exist other fundamental rights that are not expressly stated therein. (California State Const., Art. I, Sec. 1). This includes health care (Penal Code §602.11, *Leach v. Drummond Medical Group, Inc.*, 144 Cal.App.3d 362, 192 Cal.Rptr. 650 [1983] -- recognizing that Plaintiffs in obtaining medical services are members of a class of persons entitled to maintain a constitutional tort action for deprivation of medical care; *Bartling v. Superior Court*, 163 Cal.App.3d. 186, 194-195, 209 Cal.Rptr. 220 [1984] -- recognizing the fundamental constitutional right of California residents to control their medical treatment and finding it to exist in Art. I Sec. 1 of the California State Constitution and within the penumbra of rights guaranteed by the Fifth and Ninth Amendments of the United States Constitution).

While this Court has previously ruled that the ERISA statute preempts state common law and statutory laws, it has never ruled, nor can it ever rule given the Tenth Amendment, that the inferior statute of ERISA can preempt the superior Constitution of the State of California. In finding ERISA preemption applicable

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California Penal Code Section 602.11 which states in its "Historical and Statutory Notes":

> "The Legislature finds and declares that every person in the State of California has a basic and fundamental right to seek or obtain healthcare services that are sanctioned or permitted under the laws of this state. Access to that service is a matter of critical importance not only to the individual but also to the health and welfare of all citizens of this state."

here, the Ninth Circuit has run afoul of fundamental principles upon which our federalist system is based.

Additionally, as the purpose of ERISA preemption is "to protect contractually defined benefits", *Massachusetts Mutual Life Insurance*, *supra*, 437 U.S. at 148, California's Commercial Blockade Act can never be preempted by ERISA since the violation of the Act is unrelated to whether a contract exists and, under this Court's teachings, is "unrelated to" the administration of any ERISA plan. Commercial blockade such as alleged by Dr. Parrino can occur without any relationship between the offender and the victim.

In determining through its cost containment program to provide only certain limited care to Dr. Parrino, while promising him far more so as to obtain his business, and to then deprive him of access to the needed care and treatment, Respondents deprived Parrino of fundamental rights protected under the California State Constitution. These rights may not be preempted. No state should be limited to whatever rights and remedies are restricted in federal court. Every state should have the opportunity to protest and disagree with public policies announced by the federal government.

A finding of total ERISA preemption, no matter how violent and cruel the denial of care, is tantamount to ruling that ERISA has completely preempted the traditional local police power. This was not and could not be the intent of ERISA. Rather, ERISA only occupies the administration of benefits under group health care policies. ERISA is silent on occupying that kind of local conduct involving allegations of direct injury by one against the other. ERISA preemption of State laws

prohibiting such conduct would certainly impair the separation of powers envisioned by our founders. "It is difficult to believe that Congress would, without comment, remove all means of recourse for those injured by illegal conduct." (Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 [1984].)

To be free from physical injury is an inalienable and fundamental right. Being "inalienable", this freedom can never be taken away, and vests as a function of our American citizenship. As noted by Justice McReynolds when describing the breath of the word "liberty" in §1 of the Fourteenth Amendment, liberty "denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." (*Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 [1923].) It was this same liberty that was denied Dr. Parrino by Respondents, a liberty that can never be preempted by the economic statute of ERISA.

Conclusion

"ERISA preemption analysis 'must be guided by respect for the separate spheres of governmental authority preserved in our federalist system.'" (*Fort Halifax Packing Company, Inc. v. Coyne*, 482 U.S. 1, 19, 107 S.Ct. 2211, 96 L.Ed.2d 1 [1987], quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522, 101 S.Ct. 1895, 68 L.Ed.2d 402 [1981].) ERISA preemption cannot be construed to perpetuate a federal tyranny "preempting reliance on common sense" and rendering nugatory all State law protections. (dissent of Justice Stevens in *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 134, 113 S.Ct. 580, 121 L.Ed.2d 513 [1992].)

Notwithstanding the considerable efforts of this Court, there still exist important unsettled issues of federal law regarding the scope of ERISA preemption. This Petition presents this Court with the opportunity both to resolve a conflict amongst the Circuits, and to address whether the Tenth Amendment permits the federal government through the ERISA statute to supersede state constitutional protections.

WHEREFORE, Petitioner requests that this Court grant the petition for a writ of certiorari, reverse the Ninth Circuit, and compel the lower courts to follow the law.

Respectfully submitted,

Nick Parrino, as Administrator of
Stephen Frank Parrino, Deceased,
and Successor to Steve Parrino,
D.C.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 96-55920

D.C. No. CV-95-04830-TJH

ORDER AND AMENDED OPINION

NICK PARRINO, as Administrator of the Estate of Stephen Frank Parrino, Deceased, and successor to Steve Parrino, D.C.,

Plaintiff-Appellant,

v.

FHP, INC., a California Corp.; FHP HEALTHCARE, a California Corp., aka FHP Value Plan; FHP ADMINISTRATORS, a Division of Ultralink Inc., a California Corporation; FRIENDLY HILLS HEALTHCARE NETWORK, a California non-profit corporation, dba Friendly Hills Regional Medical Center; FRIENDLY HILLS MEDICAL GROUP, a general partnership; FRIENDLY HILLS REGIONAL MEDICAL CENTER GUILD, INC., a California non-profit corporation; REM ALMIRANTE, M.D., an individual; JEFFREY WOLF, M.D., an individual,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Jr., District Judge, Presiding

Argued and Submitted
November 4, 1997--Pasadena, California

Filed June 12, 1998
Amended July 28, 1998

Before: James R. Browning, Melvin Brunetti, and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Browning; Dissent by Judge Fernandez

COUNSEL

Christopher E. Angelo, and Anthony Kornarens, Mazursky, Schwartz & Angelo, Los Angeles, California, for the plaintiff-appellant.

L. Rachel Lerman Helyar, Horvitz & Levy, Encino, California, and Brian P. Barrow, O'Flaherty & Belgum, Long Beach, California, for the defendants-appellees.

ORDER

The second paragraph of Part II B of the opinion filed June 12, 1998 is amended to read as follows:

As the Supreme Court recently explained in New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995), it would be unreasonable to delimit the scope of ERISA preemption by reading Section 514(a) literally:

> If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes preemption would never run its course, for really, universally, relations stop nowhere.

Id. at 655 (citation and internal quotations). Rather, whether a state law is subject to ordinary ERISA preemption must be determined by looking to the objectives of ERISA. See id. at 656.[1]

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[1] In recent ERISA preemption cases, the Supreme Court has criticized its previous reliance on Section 514(a)'s "relate to" language as a test for ordinary ERISA preemption. See Travelers, 514 U.S. at 655 ("we have to recognize that our prior attempt to construe the phrase `relate to' does not give us much help drawing the line [regarding preemption]"). The Court has not, however, overturned its prior substantive holdings regarding the scope of ERISA preemption, explaining that "[i]n our earlier ERISA preemption cases, it had not been necessary to rely on the expansive character of ERISA's literal language in order to find preemption because the state laws at issue in those cases had a clear connection with or reference to ERISA benefits plans." DeBuono v. NYSA-ILA Med. & Clinical Serv. Fund, 117 S. Ct. 1747, 1751 (1997) (citation and internal quotations omitted). In contrast, the state laws at issue in the Court's more recent ERISA preemption cases had tenuous and peripheral connections to ERISA, requiring the Court to confront directly the issue of whether Section 514(a)'s "relate to" language should be read literally and expansively. See id. at 1752 (holding that a state gross receipts tax on hospitals was a law of general applicability falling outside the scope of ERISA preemption); California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., 117 S. Ct. 832, 842 (1997) (concluding that a state prevailing wage law had only an indirect economic impact on ERISA plans, and therefore was not preempted by ERISA); Travelers, 514 U.S. at 660-61 (holding that a state law imposing surcharges on hospital rates had only an indirect economic effect on ERISA plans, and therefore was not subject to ERISA preemption).

One of the principal goals of ERISA is to establish a uniform body of federal law governing the administration of employee benefit plans, see id. at 656-57; Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 52-3 (1987). ERISA therefore preempts "state laws providing alternative enforcement mechanisms" for ERISA plan benefits, as well as "state laws that mandate[ ] employee benefit structures or their administration." Travelers, 514 U.S. 658. Specifically, Section 514(a) preempts state causes of action based on alleged improper handling of claims for medical benefits under an ERISA plan. See Spain v. Aetna Life Ins. Co., 11 F.3d 129, 131-32 (9th Cir. 1993); Kanne v. Connecticut Gen. Life Ins. Co., 867 F.2d 489, 493-94 (9th Cir. 1988). All of Parrino's non-spoliation causes of action are predicated upon alleged improper handling of his claim for treatment by FHP and Friendly Hills: Parrino's causes of action for commercial blockade, breach of the implied covenant of good faith and fair dealing, civil conspiracy, and general negligence are based upon his allegation that FHP and Friendly Hills failed properly to process his claim for proton beam therapy; his cause of action for fraud in the inducement is based upon the defendants' failure to disclose the alleged defects in their claims processing system.

(any footnotes trail opinion)

OPINION

BROWNING, Circuit Judge:

Stephen Parrino subscribed to an HMO plan administered by FHP, Inc. and secured by his employer, Parrino Trucking

Co. Friendly Hills acted as the plan's primary health care provider. Parrino was diagnosed with a brain tumor, and Friendly Hills referred him to Loma Linda University Medical Center for treatment. Loma Linda physicians removed the brain tumor, and prescribed immediate proton beam therapy to reduce the chance of recurrence. FHP initially refused to authorize payment for the therapy, claiming it was experimental and unnecessary. Upon further review, FHP approved the therapy, but Parrino was diagnosed with a reoccurring tumor two days later. A second round of surgery failed to arrest the spread of the cancer, and Parrino ultimately succumbed to his illness.

Parrino filed suit in state court against FHP and Friendly Hills, alleging they improperly denied his initial claim for proton beam therapy. FHP and Friendly Hills removed the action to federal court on the ground that Parrino's state law causes of action were completely preempted by ERISA. The district court denied Parrino's motion to remand, and eventually dismissed each of his claims pursuant to Federal Rule of Civil Procedure 12(b)(6). Parrino's estate appeals.

I.

Parrino contends that removal was improper because (1) FHP and Friendly Hills failed to satisfy the procedural requirements for removal; (2) the district court lacked subject matter jurisdiction; and (3) the district court improperly considered an extrinsic document in determining whether it had subject matter jurisdiction. FHP and Friendly Hills counter that Parrino waived his right to appeal the district court's refusal to remand by failing to pursue interlocutory review.

We hold that Parrino did not waive his claims challenging removal, but that those claims ultimately fail.

A.

FHP and Friendly Hills argue that circuit precedent required Parrino to seek permission to take an interlocutory appeal under 28 U.S.C. § 1292(b) to preserve his objections to removal, citing, inter alia, Sorosky v. Burroughs Corp., 826 F.2d 794, 798 (9th Cir. 1987). This rule was noted and explicitly rejected, however, by Caterpillar, Inc. v. Lewis, 117 S. Ct. 467, 475 (1996). Under Caterpillar, Parrino preserved his objections to removal by moving to remand.

B.

[1] Parrino argues the procedural requirements for removal were not satisfied because Friendly Hills did not join FHP's removal notice until nearly two months after service of Parrino's complaint. All defendants must join a notice of removal, see Emrich v. Touche Ross & Co., 846 F.2d 1190, 1193 n.1 (9th Cir. 1988), and a proper removal notice must be filed within 30 days of service of the plaintiff's complaint, see 28 U.S.C. § 1446(b). Under Caterpillar, however, a procedural defect existing at the time of removal but cured prior to entry of judgment does not warrant reversal and remand of the matter to state court. See 117 S. Ct. at 477 ("To wipe out the adjudication post-judgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice.").[1] Because Friendly Hills' initial failure to join in the notice of removal was cured when Friendly Hills later joined in the notice, remand on procedural grounds would be an empty formality.

C.

[2] Parrino contends the district court erred in concluding it had removal jurisdiction because ERISA completely preempted Parrino's causes of action. Section 502(a)(1)(B) of ERISA provides an exclusively federal remedy for ERISA plan "participants" seeking to recover benefits due under the terms of their plans, to enforce their rights under the plan, or to clarify their rights to future benefits under the plan. See 29 U.S.C. § 1132(a)(1)(B). State causes of action subject to this provision are completely preempted, and will be recharacterized as federal claims for purposes of removal. See Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 64-5 (1987). Because Parrino was a participant in an ERISA plan, and at least some of his claims fall within the scope of Section 502(a)(1)(B), they were completely preempted.

[3] An ERISA plan exists "if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." Carver v. Westinghouse Hanford Co., 951 F.2d 1083, 1086 (9th Cir. 1991)(citation and internal quotations omitted). As we have explained, "[e]ven if an employer does no more than arrange for a `group-type insurance program,' it can establish an ERISA plan, unless it is a mere advertiser who makes no contributions on behalf of its employees." Credit Managers Ass'n of Southern Cal. v. Kennesaw Life & Accident Ins. Co., 809 F.2d 617, 625 (9th Cir. 1987). Because the plan covering Parrino was sponsored and paid for by Parrino's employer, and covered all of the firm's full-time employees, it was an employee benefits plan under ERISA. Parrino qualifies as a "participant" in this plan because at the time he filed suit he was an employee or former employee "eligible to receive a

benefit . . . from an employee benefit plan which cover[ed] employees" of Parrino Trucking. 29 U.S.C. § 1132(a)(1)(B); see Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 117 (1989).

[4] Parrino's causes of action for breach of the implied covenant of good faith and fair dealing and for civil conspiracy are both predicated upon alleged defects in FHP's procedures for processing health insurance claims. These causes of action therefore fall within the scope of Section 502(a)(1)(B), which embraces claims by ERISA plan participants "asserting improper processing of [insurance] claims, " Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987), and are completely preempted by ERISA. We need not consider whether Parrino's other state causes of action are completely preempted, since they fall within the district court's supplemental jurisdiction. See Jackson v. Southern Cal. Gas Co., 881 F.2d 638, 642 (9th Cir. 1989).

D.

[5] Parrino argues that the district court erred by considering a document extrinsic to the complaint, FHP's Master Group Application, in deciding whether it had subject matter jurisdiction. As a general rule, a district court deciding whether to exercise removal jurisdiction must consider only the allegations in the complaint, see City of Chicago v. Int'l College of Surgeons, 118 S. Ct. 523, 529 (1997), but the general rule is overridden by the artful pleading doctrine in complete preemption cases. Because complete preemption often applies to complaints drawn to evade federal jurisdiction, a federal court may look beyond the face of the complaint to determine whether the claims alleged as state law causes of action in fact are necessarily federal claims. See Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482, 1488-89 (7th

Cir. 1996) (in determining whether complete preemption obtains, "we are not limited by the complaint, " since "a plaintiff cannot avoid complete preemption . . . by artfully pleading a complaint so as to omit facts that include federal jurisdiction"). Because removal was based on complete preemption in this case, the district court properly considered the
Master Group Application.

II.

After removal by the defendant, the district court dismissed, on ordinary preemption grounds, all of Parrino's state causes of action other than those for spoliation of evidence. Parrino contends the district court erred in dismissing his non-spoliation state causes of action, and considering the FHP Master Group Application when deciding whether to dismiss his claims. Friendly Hills and FHP counter that Parrino waived any objection to the district court's dismissal of his non-spoliation claims by failing to reallege these claims in his first Amended Complaint.

We hold that Parrino did not waive his non-spoliation causes of action, but that they were properly dismissed.

A.

[6] A plaintiff waives all claims dismissed with leave to amend by failing to reallege those claims in his amended complaint. See London v. Coopers & Lybrand, 644 F.2d 811, 814 (9th Cir. 1981). However, we have declined to extend this rule to claims disposed of by way of summary judgment. See U.S.S.-Posco Indus. v. Contra Costa County Bldg. & Constr. Trades Council, AFL-CIO, 31 F.3d 800, 812 (9th Cir. 1994).

If the plaintiff were required to reallege claims dismissed on summary judgment to avoid waiving them, plaintiff's counsel would be forced to bear the risk of sanctions to preserve his client's right to appeal. See id. at 812. Because this concern applies with equal force to claims dismissed without leave to amend, we decline to apply the waiver rule set forth in London to Parrino's non-spoliation causes of action.

B.

[7] Parrino contends the district court erred in dismissing his non-spoliation state law causes of action on ordinary ERISA preemption grounds.[2] While complete preemption in the context of ERISA is governed by Section 502(a)(1)(B), ordinary ERISA preemption is governed by Section 514(a), which provides that the statute's substantive provisions "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. S 1144(a). Because each of Parrino's non-spoliation causes of action falls within the scope of Section 514(a), they are preempted by ERISA.

[8] As the Supreme Court recently explained in New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995), it would be unreasonable to delimit the scope of ERISA preemption by reading Section 514(a) literally:

> If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes preemption would never run its course, for really, universally, relations stop nowhere.

Id. at 655 (citation and internal quotations). Rather, whether

a state law is subject to ordinary ERISA preemption must be determined by looking to the objectives of ERISA. See id. at 656.[3]

[9] One of the principal goals of ERISA is to establish a uniform body of federal law governing the administration of employee benefit plans, see id. at 656-57; Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 52-3 (1987). ERISA therefore preempts "state laws providing alternative enforcement mechanisms" for ERISA plan benefits, as well as "state laws that mandate[ ] employee benefit structures or their administration." Travelers, 514 U.S. 658. Specifically, Section 514(a) preempts state causes of action based on alleged improper handling of claims for medical benefits under an ERISA plan. See Spain v. Aetna Life Ins. Co., 11 F.3d 129, 131-32 (9th Cir. 1993); Kanne v. Connecticut Gen. Life Ins. Co., 867 F.2d 489, 493-94 (9th Cir. 1988). All of Parrino's non-spoliation causes of action are predicated upon alleged improper handling of his claim for treatment by FHP and Friendly Hills: Parrino's causes of action for commercial blockade, breach of the implied covenant of good faith and fair dealing, civil conspiracy, and general negligence are based upon his allegation that FHP and Friendly Hills failed properly to process his claim for proton beam therapy; his cause of action for fraud in the inducement is based upon the defendants' failure to disclose the alleged defects in their claims processing system.

C.

[10] Parrino also argues that the district court erred in considering the FHP Master Group Application when ruling on the defendants' motion to dismiss. A district court ruling on a motion to dismiss may consider documents "whose contents are alleged in a complaint and whose authenticity no party

questions, but which are not physically attached to the [plaintiff's] pleading." Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994). Although we have yet to apply this rule to documents crucial to the plaintiff's claims, but not explicitly incorporated in his complaint, such an extension is supported by the policy concern underlying the rule: Preventing plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting references to documents upon which their claims are based, see Pension Benefit Guaranty Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993). At least one other circuit has held that if a plaintiff's claims are predicated upon a document, the defendant may attach the document to his Rule 12(b)(6) motion, even if the plaintiff's complaint does not explicitly refer to it. See Cortec Indus., Inc. v. Sum Holdings, L.P., 949 F.2d 42, 47 (2d Cir. 1991)(upholding the district court's consideration of a stock purchase agreement and an offering memorandum attached to the defendant's Rule 12(b)(6) motion where the plaintiff alleged securities fraud).

We therefore hold that a district court ruling on a motion to dismiss may consider a document the authenticity of which is not contested, and upon which the plaintiff's complaint neces-sarily relies.[4]

[11] In this case, Parrino's complaint and First Amended Complaint both make reference to the FHP "group plan" and its "cost containment program." Because Parrino's claims rest on his membership in FHP's plan and on the terms of the plan, documents governing plan membership, coverage, and administration are essential to his complaint. The FHP Group

Application Plan includes key terms regarding the plan covering Parrino, and its authenticity was not disputed by the parties. Accordingly, it was proper for the district court to consider that document in ruling on the defendants' motions to dismiss.

III.

In dismissing Parrino's initial complaint, the district court granted Parrino leave to amend his state causes of action for intentional and negligent spoliation of evidence. Parrino reasserted these spoliation causes of action in his First Amended Complaint, but the district court dismissed the complaint under Rule 12(b)(6). Parrino challenges this dismissal.[5]

[12] To make out a cause of action for either negligent or intentional spoliation of evidence, the plaintiff must plead facts showing the defendant has destroyed or concealed documents or physical evidence needed in prospective or pending litigation. See Gomez v. Acquistapace, 57 Cal. Rptr. 2d 821, 823 (1996)(noting plaintiff's allegation that the defendant destroyed physical evidence needed in a product liability suit); Velasco v. Commercial Bldg. Maintenance Co., 215 Cal. Rptr. 504, 506 (1985)(same). In contrast to the factual allegations pled in these cases, Parrino's complaint asserts bare, generalized claims with little factual support. Parrino failed to plead the existence of any documents or physical evidence in the possession of FHP or Friendly Hills needed by Parrino in this litigation, nor did he plead any facts showing concealment or destruction of such evidence. Because "[c]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim," In re VeriFone Sec. Litig., 11 F.3d 865, 868 (9th Cir. 1993), the district court properly dismissed Parrino's spoliation of evidence claims.

IV.

Parrino argues that preemption of his state law claims by ERISA violates his Seventh Amendment right to jury trial. We have previously considered and rejected this argument. See Spinelli v. Gaughan, 12 F.3d 853, 857 (9th Cir. 1993). Because Parrino failed to raise the remainder of his constitutional claims below, these claims are waived, and we decline to consider them.

AFFIRMED.

FERNANDEZ, Circuit Judge, Dissenting.

I am unable to agree with the majority because in my opinion the removal of this case was improper. Friendly Hills was required to join in the removal request within a thirty-day period. See 28 U.S.C. § 1446(a)-(b). It did not do so. That failure made removal improper, the case should have been remanded, and it should be remanded now. Thus, I do not actually reach the ultimate merits or join in any part of the majority opinion, although I would be inclined to agree that Parrino should not ultimately prevail.

FHP argues that Caterpillar Inc. v. Lewis, 519 U.S. 61, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996), stands for the proposition that as long as the removal defect was cured sometime before the district court reached its final decision to dismiss, the case should not be remanded. I disagree. Caterpillar dealt with a situation where a jurisdictional defect was cured and a case proceeded through the long pretrial process and into a full blown jury trial. See id. at _____, 117 S. Ct. at 470-71. The Court recognized the arguments against permitting the

result of that trial to stand. As it said, the "arguments are hardly meritless." Id. at _____, 117 S. Ct. at 476. But, it continued, "[o]nce a diversity case has been tried in federal court, with rules of decision supplied by state law . . . considerations of finality, efficiency, and economy become overwhelming." Id.

That simply is not the case here, and I do not agree with extending Caterpillar to a case which was merely disposed of on a motion under Federal Rule of Civil Procedure 12(b)(6). The closest any court has come to that is a case where judgment was entered in a tag along matter in coordinated multidistrict litigation. There the court emphasized the need for finality in disposing of a matter which was "analytically indistinguishable" from others it had decided. See Kocher v. Dow Chem. Co., 132 F.3d 1225, 1230 (8th Cir. 1997). But a decision which is more closely in point remanded a removed case because "there ha[d] been no trial, and no further judicial resources ha[d] been expended on this case since the Order denying remand." Arnold v. Blue Cross & Blue Shield of Texas, Inc., 973 F. Supp. 726, 743-44 (S.D. Tex. 1997). That was true, even though attorney resources had been expended. See id. at 744 n.32.

It seems to me that extending Caterpillar to this case simply elides the procedures set forth in S 1446 and replaces them with a rule that the district court may, in its discretion, decline to remand when those procedures are not complied with. I cannot agree with that reading of the statute or of Caterpillar. I do not believe that reading is, in the long run, designed to enhance economy or efficiency. It is designed to enhance interference with state court proceedings, district court amendment of the removal statutes, and unnecessary appeals.

Thus, I respectfully dissent.

FOOTNOTES

1 We do not, as the dissent suggests, read Caterpillar to authorize district courts to ignore the procedural requirements for removal: to the contrary, we agree with Caterpillar that "[t]he procedural requirements for removal remain enforceable by the federal trial court judges to whom those requirements are directly addressed." 117 S. Ct. at 477. We understand Caterpillar merely to permit the Court of Appeals to treat as cured a procedural defect in the removal process corrected before entry of judgment.

2 Ordinary preemption substitutes federal rules of decision for state rules of decision, in contrast to complete preemption, which negates state causes action entirely and recasts them as federal claims. See Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure: Civil,§ 3722 (2d ed. 1985 & 1996 Supp.).

3 In recent ERISA preemption cases, the Supreme Court has criticized its previous reliance on Section 514(a)'s "relate to" language as a test for ordinary ERISA preemption. See Travelers, 514 U.S. at 655 ("we have to recognize that our prior attempt to construe the phrase `relate to' does not give us much help drawing the line [regarding preemption]"). The Court has not, however, overturned its prior substantive holdings regarding the scope of ERISA preemption, explaining that "[i]n our earlier ERISA preemption cases, it had not been necessary to rely on the expansive character of ERISA's literal language in order to find preemption because the state laws at issue in those cases had a clear connection with or reference to ERISA benefits plans." DeBuono v. NYSA-ILA Med. & Clinical Serv. Fund, 117 S. Ct. 1747,

1751 (1997) (citation and internal quotations omitted). In contrast, the state laws at issue in the Court's more recent ERISA preemption cases had tenuous and peripheral connections to ERISA, requiring the Court to confront directly the issue of whether Section 514(a)'s "relate to" language should be read literally and expansively. See id. at 1752 (holding that a state gross receipts tax on hospitals was a law of general applicability falling outside the scope of ERISA preemption); California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., 117 S. Ct. 832, 842 (1997) (concluding that a state prevailing wage law had only an indirect economic impact on ERISA plans, and therefore was not preempted by ERISA); Travelers, 514 U.S. at 660-61 (holding that a state law imposing surcharges on hospital rates had only an indirect economic effect on ERISA plans, and therefore was not subject to ERISA preemption).

4 As Parrino notes, where a defendant attaches extrinsic evidence to a Rule 12(b)(6) motion, the court ordinarily must convert that motion into one for summary judgment under Rule 56 to give the plaintiff an opportunity to respond. See Cortec, 949 F.2d at 48. Where, however, an attached document is integral to the plaintiff's claims and its authenticity is not disputed, the plaintiff "obviously is on notice of the contents of the document and the need for a chance to refute evidence is greatly diminished." White Consolidated Industries, 998 F.2d at 1196-97.

5 The California Supreme Court recently held that "there is no tort remedy for the intentional spoliation of evidence by a party to the cause of action to which the spoliated evidence is relevant. " Cedars-Sinai Med. Center v. Superior Court, No. S048596, 1998 WL 234060, at 11 (Cal. 1998). We need not decide whether this decision applies retroactively to

divest Parrino of his spoliation causes of action, since he failed to state a claim for spoliation of evidence under preexisting caselaw.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CV 95-4830 TJH (SHx)

STEVE PARRINO,

Plaintiff,

v.

FHP, INC., et al,

Defendants.

ORDER

The Court has considered Plaintiff's motion to remand and motion for sanctions, and Defendants' motion to strike and motion to dismiss, together with the moving and opposing papers.

IT IS ORDERED that Plaintiff's motion to remand be, and hereby is, DENIED.

IT IS FURTHER ORDERED that Plaintiff's motion for sanctions be, and hereby is, DENIED.

It is further Ordered that Plaintiff's prayers for punitive damages be, and hereby are, STRICKEN.

It is further Ordered that Plaintiff's claims for intentional and negligent spoliation of evidence, and hereby are, DISMISSED, with leave to amend.

It is further Ordered that Plaintiff's remaining state claims be, and hereby are, DISMISSED, with prejudice, since those claims are pre-empted by ERISA.

Date: 10/6/95

s/
Terry J. hatter, Jr
USDJ

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CV 95-4830 TJH (SHx)

STEVE PARRINO,

Plaintiff,

v.

FHP, INC., et al,

Defendants.

ORDER

The Court has considered Defendants' motion to dismiss, together with the moving and opposing papers.

IT IS ORDERED that the motions to dismiss be, and hereby are, GRANTED.

Date: May 10, 1996

Date: 10/6/95

s/
Larry J. hatter, Jr
USDJ

Penal Code section 602.11 with historical note:

§602.11 Obstructing passage to or from health care facilities, places of worship or schools; punishment; definitions

(a) Any person, alone or in concert with others who intentionally prevents an individual from entering or exiting a health care facility, place of worship, or school by physically detaining the individual or physically obstructing the individual's passage shall be guilty of a misdemeanor punishable by imprisonment in the county jail, or a fine of not more than two hundred fifty dollars ($250), or both, for the first offense; imprisonment in the county jail for not less than five days and a fine of not more than five hundred dollars ($500) for the second offense; and imprisonment in the county jail for not less than 30 days and a fine of not more than two thousand dollars ($2,000) for a third of subsequent offense. However, the court may order the defendant to perform community service, in lieu of any fine or any imprisonment imposed under this section, if it determines that paying the fine would result in undue hardship to the defendant or his or her dependents.

(b) As used in subdivision (a), the following terms have the following meanings:

(1) "Physically" does not include speech.

(2) "Health care facility" means a facility licensed pursuant to Chapter 1 (commencing with Section 1200) of Division 2 of the Health and Safety Code, a health facility licensed pursuant to Chapter 2 (commencing with Section 1250) of

Division 2 of the Health and Safety Code, or any facility where medical care is regularly provided to individuals by persona licensed under Division 2 (commencing with Section 500) of the Business and Professions Code, the Osteopathic Initiative Act, or the Chiropractic Initiative Act.
(3) "Person" does not include an officer, employee, or agent of the health care facility, or a law enforcement officer, acting in the course of his or her employment.

(c) This section shall not be interpreted to prohibit any lawful activities permitted under the laws of the State of California or by the National Labor relations Act in connection with a labor dispute.

HISTORICAL AND STATUTORY NOTES

Section 1 of Stats. 1992, c. 925 (A.B. 1097), provides:

"The Legislature finds and declares that every person in the State of California has a basic and fundamental right to seek or obtain health care services that are sanctioned or permitted under the laws of this state. Access to these services is a matter of critical importance not only to physically obstruct access to a health care facility in order to prevent a person from exercising his or her basic and fundamental right to obtain health care services, is contrary to the interests of the people of the State of California."

§ 11409. Misrepresentations; penalties; misdemeanor

(a) No prepaid health plan, marketing representative, or marketing organization shall in any manner misrepresent

themselves, the plans they represent or the Medi-Cal program. Violation of this section shall include, but are not limited to:

(1) False or misleading claims that marketing representatives are employees or representatives of the state, county, or anyone other than the prepaid health plan or the organization by whom they are reimbursed.

(2) false or misleading claims, that the prepaid health plan is recommended or endorsed by any sate or county agency, or by any other organization which has not certified its endorsement in writing to the prepaid health plan.

(3) False or misleading claims that the state or county recommends that a Medi-Cal beneficiary enroll in a prepaid health plan.

(4) Claims that a Medi-Cal beneficiary will lose his benefits under the Medi-Cal program or any other health or welfare benefits to which he is legally entitled, if he does not enroll in a prepaid health plan.

(b) Violations of any provisions of this article or regulations adopted by the department pursuant to this article shall result in one or more of the following:

(1) Revocation of one or more permitted methods of marketing.

(2) Refusal of the department to accept new enrollments for a period specified by the department.

(3) Refusal of the department to accept enrollments submitted by a marketing representative or organiation.

(4) Forfeiture by the plan of all or part of the capitation payments for persons enrolled as a result of such violations.

(5) Requirements that the prepaid health plan is violation of this article personally contact each enrollee enrolled to explain the nature of the violation and inform the enrollee of his right disenroll.

(6) Application of sanctions as provided in Section 14304.

(c) Any marketing representative who violates subdivision (a) while engaged in door-to-door solicitation is guilty of a misdemeanor, and shall be subject to a fine of five hundred dollars ($500) or imprisonment in the county jail for six months or both.

Civil Code section 3427

§ 3427, Definitions

As used in this title:

(a) "Aggrieved" means and refers to any of the following persons or entities:

(1) a person physically present at a health care facility when commercial blockade occurs whose access is obstructed or impeded.

(2) A person physically present at a health care facility when a commercial blockade occurs whose health care is disrupted.

(3) A health care facility where a commercial blockade occurs, its employees, contractors, or volunteers.

(a) The owner of a health care facility where a commercial blockade occurs or of the building or property upon which the health care facility is located.

(b) "Commercial blockade" means acts constituting the tort of commercial blockade, as defined in Section 3427.1

(c) "Disrupting the normal functioning of a health care facility" means intentionally rendering or attempting to render a health care facility temporarily or permanently unavailable or unusable by a licensed health practitioner, the facility's staff or patients. "Disrupting the normal functioning of a health care facility" does not include acts of the owner of the facility, an agent acting on behalf of the owner, or officers or employees of a governmental entity acting to protect the public health or safety.

(d) "Health care facility" means a facility that provides health care services directly to patients, including, but not limited to, a hospital, clinic, licensed health practitioner's office, health maintenance organization, diagnostic or treatment center, neuropsychiatric or mental health facility, hospice, or nursing home.

(Added by Stats. 1994, c. 1193 (A.B.600). § 1.)

Civil Code section 3427.1

§ 3427.1 Commercial blockade

It is unlawful, and constitutes the tort of commercial blockade for a person, alone or in concert with others, to intentionally prevent an individual from entering or exiting a health care facility by physically obstructing the individual's passage or by disrupting the normal functioning of a health care facility.

(Added by Stats. 1994, c. 1193 (A.B.600). § 1.)

Civil Code section 3427.2

§ 3427.2 Civil damages; parties to action

A person or health care facility aggrieved by the actions prohibited by this title may seek civil damages from those who committed the prohibited acts and those acting in concert with them.

Civil Code Section 22.2

§ 22.2 Common law of England; rule of decision.

The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.

Business and Professions Code section 145

§ 145. Legislative findings and declaration

The Legislature finds and declares that:

(a) Unlicensed activity In the professions and vocations regulated by the Department of Consumer Affairs is a thereat to the health, welfare, and safety of the people of the State of California.

(b) The law enforcement agencies of the state should have sufficient, effective, and responsible means available to enforce the licensing laws of the state.

(c) The criminal sanction for unlicensed activity should be swift, effective, appropriate, and create a strong incentive to obtain a license.

Business and Professions Code section 510

§ 510. Retaliation against health care practitioners who advocate for appropriate health care for patients; prohibition; scope of protection.

(b) It is the public policy of the State of California that a health care practitioner be encouraged to advocate for appropriate health care for his or her patients. For purposes of this action, "to advocate for appropriate health care" means to appeal a payer's decision to deny payments for a service pursuant to the reasonable grievance or appeal procedure established by a medical group, independent practice association, preferred provider organiation, foundation, hospital medical staff and governing body, or payer, or to protest a

decision, policy, or practice that the health care practitioner, consistent with that degree of learning and skill ordinarily possessed b reputable health care practitioners with the same license or certification and practicing according to the applicable legal standard of care, reasonably believes impairs the health care practitioner's ability to provide appropriate health care to his or her patients.

California Constitution, Art. 3, Section 1

§ 1. Inalienable rights.

Section 1. All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy.

28 U.S.C. § 1144. Other laws

·(a) Supersede; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975. ·(b) Construction and application ·(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred,

before January 1, 1975. ·(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities. ·(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies. ·(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title. ·(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

29 U.S.C. § 1132. Civil enforcement

·(a) Persons empowered to bring a civil action

A civil action may be brought -
·(1) by a participant or beneficiary -
·(A) for the relief provided for in subsection (c) of this section, or ·(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

U.S. Constitution, Art. I, Section 8.

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;--And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Constitution, Art. I, Section 9

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases or Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census of Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular

Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.

U.S. Constitution, Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Constitution, Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Constitution, Amendment XIV

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Health & Saafety Code section 1360

(a) No plan, solicitor, solicitor firm, or representative shall use or permit the use of any advertising or solicitation which is untrue or misleading, or any form of evidence of coverage which is deceptive. For purposes of this article:
(1) A written or printed statement or item of information shall be deemed untrue if it does not conform to fact in any respect which is, or may be significant to an enrollee or subscriber, or potential enrollee or subscriber in a plan.
(2) A written or printed statement or item of information shall be deemed misleading whether or not it may be literally true, if, in the total context in which the statement is made or such item of information is communicated, such statement or item of information may be understood by a person not possessing such knowledge regarding health care coverage, as indicating any benefit or advantage, or the absence of any exclusion, limitation, or subscriber, in a plan, and such is not the case.
(3) An evidence of coverage shall be deemed to be deceptive if the evidence of coverage taken as a whole and with consideration given to typography and format, as well as language, shall be such as to cause a reasonable person, not possessing special knowledge of plans, and evidence of coverage therefor to expect benefits, service charges, or other advantages which the evidence of coverage does not provide or which the plan issuing such coverage or evidence of coverage does not regularly make available to enrollees or subscribers covered under such evidence of coverage.
(b) No plan, or solicitor, or representative shall use or permit the use of any verbal statement which is untrue, misleading, or deceptive, or make any representations about coverage offered by the plan or its cost that does not conform to fact. All verbal statements are to be held to the same standards as those for printed matter provided in subdivision (a).

Supreme Court, U.S.
FILED
OCT 14 1998
OFFICE OF THE CLERK

No. 98-432

In The

Supreme Court of the United States

October Term 1998

NICK PARRINO, as Administrator, etc.,

Petitioner,

vs.

FHP, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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12 pp

QUESTIONS PRESENTED

1. Should certiorari be granted to address the propriety of the court of appeals' disposition of a cause of action for fraud in the inducement that was not alleged against these answering respondents?

2. Should certiorari be granted to address the question of whether the Employee Retirement Income Security Act (ERISA) preempts a state statute when that statute had not taken effect at the time of the alleged acts of the respondents and, in any event, would not apply to those alleged acts by the statute's own terms?

CORPORATE AFFILIATIONS OF RESPONDENTS FRIENDLY HILLS HEALTHCARE NETWORK, ET AL.

The parent corporation for respondents Friendly Hills Healthcare Network and Friendly Hills Regional Medical Center is Caremark International. The parent corporation of Caremark International is MedPartners, Inc. Both Caremark International and MedPartners, Inc. have issued shares to the public.

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STATEMENT OF THE CASE

A. Introduction

Nick Parrino brings this petition against FHP and Friendly Hills,[1] insisting that his state causes of action for fraud and commercial blockade are not preempted by ERISA (29 U.S.C. §§ 1001 et seq.). Review by this court, however, is only appropriate when petitioner presents "compelling reasons." (Sup. Ct. Rule 10.) This case presents no such reasons.

Moreover, Parrino fails to mention a number of key facts in his petition. The first is that Friendly Hills was never named as a defendant in the cause of action for fraud in the inducement. It follows that Parrino's first ground for certiorari does not even apply to Friendly Hills.

As for his other ground, Parrino misleads this court in two ways: (1) the commercial blockade statute did not take effect in California until after the events of this case took place; and, (2) the California Legislature intended the statute to prevent physical blockade of medical facilities where abortions are performed. It was not intended as a means for recovery due to alleged delay of medical treatment by ERISA plan provider. Given these facts, as well as the preemptive effect of ERISA, this case fails to

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[1] "FHP" collectively refers to respondents FHP, Inc., FHP Healthcare, aka FHP Value Plan, FHP Administrators, and Rem Almirante, M.D. "Friendly Hills" collectively refers to respondents Friendly Hills Healthcare Network, Friendly Hills Medical Group, and Jeffrey Wolf, M.D.

present any compelling reasons to justify granting certiorari. Parrino's petition should be denied.

B. The Facts

Stephen Parrino subscribed to a group health plan administered by FHP. His employer, Parrino Trucking, Inc., secured the plan for the benefit of its eleven employees. Parrino Trucking paid for each employee's coverage under the plan. Friendly Hills provided the medical care under the plan. In October 1993, Friendly Hills physicians diagnosed Parrino with a cancerous brain tumor. They referred him to Loma Linda University Medical Center for surgical removal of the tumor. After the surgery, they recommended "proton-beam therapy" in order to reduce the chances of reoccurrence. App. 4a-5a; *Parrino v. FHP, Inc.*, 146 F.3d 699, 702 (9th Cir. 1998).

FHP initially declined to provide the therapy on the grounds that it was experimental and unnecessary. Upon further review approximately two months later, however, FHP approved the therapy. Shortly thereafter, Friendly Hills doctors diagnosed Parrino with another tumor. Although the surgeons at Loma Linda performed a second surgery, the new tumor could not be safely removed. App. 5a; 146 F.3d at 702.

C. Proceedings Below

Two days before he died, Parrino filed an action in California state court. His complaint alleged that FHP's delay in approving the proton-beam therapy caused his

second tumor. It named Friendly Hills in causes of action for civil conspiracy, interference with access to health care, spoliation of evidence, and general negligence. Parrino also sued FHP for fraud in the inducement and breach of the implied covenant. (9th Cir. Excerpts of Record at 19-68.) The complaint failed to mention the fact that Parrino's health care plan had been procured by his employer.[2]

FHP and Friendly Hills removed the action to the United States District Court on the ground that it was completely preempted by ERISA. After denying Parrino's motion to remand, the district court dismissed the entire complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

Parrino appealed the district court's order to the Ninth Circuit. Citing circuit precedent (as well as authority from this court), the court of appeals affirmed the district court's dismissal of the case. The Ninth Circuit determined that state causes of action based on allegedly improper handling of medical benefit claims under an ERISA plan are preempted. Applying the facts, the court found that Parrino's causes of action against Friendly

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[2] It is ironic that Parrino bases his petition in part on a cause of action for fraud in the inducement. Parrino (through his attorneys) failed to disclose in his complaint that his employer provided his health benefits. As the Ninth Circuit recognized, this failure was an attempt to artfully plead his complaint "so as to omit facts that include federal jurisdiction." App. 9a; 146 F.3d at 704.

Hills were all "predicated upon alleged improper handling of his claim for treatment" and were therefore preempted.[3]

Parrino now brings this petition claiming this court should grant certiorari because: (1) his cause of action for fraud in the inducement is not preempted by ERISA; and, (2) the state police power underlying California's commercial blockade statute likewise cannot be preempted by ERISA.

REASONS WHY THE PETITION SHOULD BE DENIED

I

Issue "A" of Parrino's Petition Does Not Involve Friendly Hills.

Parrino's first ground for certiorari (Issue "A") does not apply to Friendly Hills. It focuses on the question of whether a state cause of action for fraud in the inducement is preempted. Parrino did not, however, name Friendly Hills as a defendant in this fraud cause of action. Friendly Hills only provided the medical care in this case; it did not have any involvement in the alleged misrepresentations that Parrino claims induced his employer to purchase medical care services through FHP. In short,

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[3] The dissenting opinion below was based on the question of whether removal was proper. App. 14a-16a; 146 F.3d at 707 (Fernandez, J., dissenting). Parrino does not raise this issue in his petition, and it thus is not before this court. Interestingly, Judge Fernandez observed in his dissent: "I would be inclined to agree that Parrino should not ultimately prevail." App. 14a; 146 F.3d at 707.

Parrino did not name Friendly Hills in the fraud claim because Friendly Hills had no involvement other than to provide the actual medical care. The denial of certiorari on this ground with regard to Friendly Hills requires no further analysis.

II

Parrino Has No Standing to Assert Issue "B" of His Petition and, in Any Event, the State Statute Raised in Issue "B" Does Not Apply to the Alleged Acts of Respondents.

Parrino's second ground for certiorari at least applies to Friendly Hills. Nevertheless, it suffers from factual and legal flaws that prevent it from serving as even a tenable (let alone compelling) reason for the granting of certiorari.

Parrino claims that the Tenth Amendment prohibits a federal statutory scheme such as ERISA from preempting California's "commercial blockade" laws, California Civil Code §§ 3427 et seq. But he fails to advise this court that the state statutes did not take effect until January 1, 1995. See Cal. Const., art. IV, § 8.[4] The incidents described in Parrino's complaint all took place in 1994, prior to the

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[4] Article IV, section 8, subdivision (c) of the California Constitution sets forth the general rule in California that, absent emergency legislation (and there was none here), statutes take effect on January 1 following the date the legislation is signed by the governor. The commercial blockade statutes were all enacted in 1994 (see App. 26a-28a), and thus became effective January 1, 1995. By that time, however, all of the events alleged in Parrino's complaint had already taken place.

effective date of the statutes. As such, the "tort" of commercial blockade did not even exist at the time Parrino claims the acts occurred. Moreover, nothing contained in the statutes make them retroactive to events occurring before the new laws' operative date. (See App. 25a-27a.)[5]

Furthermore, "commercial blockade" is defined in California Civil Code section 3427.1 as "intentionally prevent[ing] an individual from entering or exiting a health care facility by *physically obstructing* the individual's passage or by disrupting the normal functioning of a health care facility." (Italics added.) App. 27a. Parrino never alleged in his complaint that defendants physically obstructed him. Instead, Parrino alleged that FHP and Friendly Hills "disrupted the normal function of the Loma Linda University Medical Center health care facility by intentionally rendering or attempting to render said health care facility unavailable or unusable to [Parrino] and his health care providers. . . . " (9th Cir. Excerpts of Record at 42.)

This is not what the California Legislature had in mind when it enacted the commercial blockade statutes. The legislation was intended to deal with situations where the operation of a health care facility, such as an abortion clinic, was physically interfered with, not where a patient alleges that benefits due him under an employer-provided health plan were improperly withheld or delayed. *Review of Selected 1994 Legislation*, 26 Pac.L.J. 729 (1995).

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[5] Parrino never attempted to refute Friendly Hills' argument below that the commercial blockade statutes had not yet taken effect at the time of the acts alleged in the complaint.

Even if Parrino could somehow overcome all of these standing problems, his argument would still fail. As the Ninth Circuit here correctly recognized, ERISA preempts " 'state laws providing for alternative enforcement mechanisms' for ERISA plan benefits, as well as 'state laws that mandate[ ] employee benefit structures or their administration.' " App. 11a; 146 F.3d at 705, quoting *New York State Conference of Blue Cross & Blue Shield v. Travelers Ins. Co.*, 514 U.S. 645, 658 (1995). Parrino's cause of action for commercial blockade is based on his allegation that defendants failed to properly process his health plan benefits claim. It seeks an "alternative enforcement mechanism" for the alleged denial of health plan benefits. As such, it is preempted by ERISA.

CONCLUSION

The decisions rendered below are free from error. Parrino presents no persuasive (let alone compelling) reason that would justify intervention by this court. The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 98-432

In The

Supreme Court of the United States

October Term, 1998

NICK PARRINO, as Administrator of the Estate of Stephen Frank Parrino, Deceased, and Successor to Stephen Parrino, D.C.,

Petitioner,

vs.

FHP, INC., a California corporation; FHP HEALTHCARE, a California corporation, A.K.A. FHP VALUE PLAN; FHP ADMINISTRATORS, a Division of Ultralink, Inc., a California corporation, dba Friendly Hills Regional Medical Center; FRIENDLY HILLS MEDICAL GROUP, a general partnership; FRIENDLY HILLS REGIONAL MEDICAL CENTER GUILD, INC., a California non-profit corporation; REM ALMIRANTE, M.D., an individual; JEFFREY WOLF, M.D., an individual,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Does ERISA preempt state common law claims alleged against an ERISA plan administrator for injuries arising from its alleged improper handling of a claim for medical benefits?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I. INTRODUCTION.

FHP Inc., FHP Healthcare (erroneously sued and served herein as FHP Healthcare aka FHP Value Plan), FHP Administrators, a division of Ultralink, Inc., and Remedios Almirante, M.D. (erroneously sued and served herein as Rem Almirante, M.D.) (collectively "Respondents") hereby respond to the Petition for Writ of Certiorari ("Petition") filed by Petitioner Nick Parrino ("Petitioner"). Respondents respectfully request that this Court deny the Petition.

This is an action for damages arising from an ERISA plan's alleged delay in processing a claim for medical benefits. The district court dismissed the complaint, and the Ninth Circuit affirmed. Both courts recognized that this case involves garden-variety utilization review claims of the kind consistently held preempted by ERISA since this Court's decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987).

Review by this Court is unnecessary because (a) the decision of the Ninth Circuit Court of Appeals[1] does not conflict with any decision of any other United States court of appeals or any decision of this Court, and (b) the Ninth Circuit's decision was dictated by this Court's previous decisions. *See* Sup. Ct. Rule 10.

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[1] The opinion of the Ninth Circuit Court of Appeals is reported at 146 F.3d 699 (9th Cir. 1998). A copy is included as an appendix to the Petition.

II. STATEMENT OF THE CASE.

As alleged in the pleadings, Steve Parrino ("Steve") belonged to an FHP group health plan. (S.E.R. 1, Exh. A at p. 5, ¶ 13; S.E.R. 43 at 6, ¶ 15.) Although he worked as a chiropractor, Steve received medical benefits through the employee health plan negotiated by FHP with Parrino Trucking, the trucking business owned by Steve's father, Nick Parrino. (S.E.R. 17, Exh. A.)

In the fall of 1993, Steve, who had a history of lung cancer preceding his enrollment in FHP, was diagnosed with a metastatic brain tumor. (S.E.R. 43 at 8, ¶ 21; E.R. at 63-64.) FHP and Friendly Hills[2] referred him to Loma Linda University Medical Center for surgery. Loma Linda physicians operated to remove the brain tumor on October 19, 1994. (S.E.R. 43 at 8-9, ¶ 22.) The surgery was, in plaintiff's words, "a complete success," and Steve was "extremely grateful" to his physicians. (*Id.*)

The Loma Linda physicians recommended that Steve receive proton beam therapy as a prophylactic measure once he recovered from surgery. (*Id.*) Steve submitted a claim for this treatment. Although FHP and Friendly Hills initially denied the claim, they ultimately agreed to authorize payment for the treatment (about two months after the claim was first made). (*Id.* at 11, ¶ 31.) In the

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[2] There are two sets of defendants, the FHP defendants and the Friendly Hills defendants. We use "FHP" to refer to FHP, Inc.; FHP Healthcare (wrongly sued and served herein as FHP Healthcare aka FHP Value Plan); FHP Administrators, a division of Ultralink, Inc.; and Remedios Almirante, M.D. We use "Friendly Hills" to refer to Friendly Hills Healthcare Network; Friendly Hills Medical Group; and Jeffrey Wolf, M.D.

meantime, the metastatic tumor had recurred, and the Loma Linda surgeons had to operate again, this time with less success. (*Id.* at 11-12, ¶¶ 30, 33.) The tumor spread, and Steve died on June 25, 1994. (*Id.* at 12, ¶ 34.)

Three days before his death, Steve filed a complaint against FHP, Friendly Hills, and certain of their employees, in the Los Angeles Superior Court. The complaint alleged various state common law tort claims, including fraud and violation of California's commercial blockade statute, California Civil Code section 3427.1. (*See* S.E.R. 1, Exh. A.) The gravamen of the complaint was injury caused by FHP's "defective" economic design, which was allegedly responsible for the delay in approving benefits. (*See* S.E.R. 43 at 6-8, ¶¶ 16-19, 20; 11-12, ¶ 31; 13-15, ¶¶ 38-39; 18-20, ¶ 45.)

On July 21, 1995, defendants removed the case to federal district court. FHP later filed a motion to dismiss the action on the grounds of ERISA preemption and failure to state a claim. (S.E.R. 6; S.E.R. 7.) Plaintiff, in turn, moved to remand the case to state court. (C.R. 14; E.R. at 120-24.) The district court denied the motion to remand, and, after allowing plaintiff to amend his complaint, granted defendants' motions to dismiss. (S.E.R. 63.)

The Ninth Circuit Court of Appeals affirmed. The majority held that Parrino's state law claims (with the exception of his spoliation claims, which the court held properly dismissed) were preempted by ERISA. *See* opinion, Petition at 11a ("All of Parrino's non-spoliation causes of action are predicated upon alleged improper handling of his claim for treatment by FHP and Friendly

Hills: Parrino's causes of action for commercial blockade, breach of the implied covenant of good faith and fair dealing, civil conspiracy, and general negligence are based upon his allegation that FHP and Friendly Hills failed properly to process his claim for proton beam therapy; his cause of action for fraud in the inducement is based upon the defendants' failure to disclose the alleged defects in their claims processing system"). Judge Fernandez dissented on procedural grounds related to removal, although he stated he "would be inclined to agree that Parrino should not ultimately prevail." Opinion, Petition at 14a (Fernandez, J., dissenting).

III. NONE OF THE ISSUES RAISED IN THE PETITION WARRANTS A WRIT OF CERTIORARI.

A. Certiorari Is Not Warranted On The Fraud Claims Because The Ninth Circuit's Decision Is Consistent With The Decisions Of This Court And The Other Courts Of Appeals.

1. ERISA Preempts State Law Claims, Including Fraud Claims, That Relate To The Processing Of Claims For Medical Benefits.

Claims based on "utilization review" (the process by which an ERISA plan administrator determines coverage of prospective medical treatment) have long been deemed preempted under ERISA sections 514(a) and 502(a) by this Court and the United States Courts of Appeals. *See, e.g., Pilot Life*, 481 U.S. at 47, 52-57; *Crull v. GEM Ins. Co.*, 58 F.3d 1386, 1391 (9th Cir. 1995); *Spain v. Aetna Life Ins. Co.*, 11 F.3d 129, 131-32 (9th Cir. 1993), *cert. denied*, 511 U.S. 1052 (1994); *Olson v. General Dynamics Corp.*, 960 F.2d 1418, 1423 (9th Cir. 1991), *cert. denied*, 504 U.S. 986 (1992);

Kanne v. Connecticut Gen. Life Ins. Co., 867 F.2d 489, 493-94 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989); *see also Dukes v. U.S. Healthcare*, 57 F.3d 350, 360-61 (3d Cir. 1993), *cert. denied*, 516 U.S. 1009 (1995); *Kuhl v. Lincoln Nat'l Health Plan, Inc.*, 999 F.2d 298, 303-04 (8th Cir. 1993), *cert. denied*, 510 U.S. 1045 (1994); *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1332-33 (5th Cir.), *cert. denied*, 506 U.S. 1033 (1992).[3]

In *Pilot Life*, this Court held that ERISA preempts state common law contract and tort claims, including claims for fraud in the inducement, in suits asserting the improper processing of benefits claims by ERISA participants and beneficiaries. ERISA preempts such claims both because state efforts to regulate descriptions of plan coverage "relate to" plan administration for purposes of section 514(a), ERISA's preemption clause, and because they conflict with section 502(a), ERISA's exclusive remedial provision. *See Pilot Life*, 481 U.S. at 42, 47, 52-57.

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[3] This Court recently affirmed the viability of *Pilot Life*. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1683 (1995) ("we do not hold today that ERISA pre-empts only direct regulation of ERISA plans, nor could we do so with fidelity to the views expressed in our prior opinions on the matter" (citing *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 139 (1990); *Pilot Life*, 481 U.S. at 47-48; *Shaw v. Delta Air Lines*, 463 U.S. 85, 98 (1983)). The Ninth Circuit, too, has held that cases following *Pilot Life* remain good law. *See Crull*, 58 F.3d at 1391 (holding state law claims based on denial of coverage pre-empted by ERISA). "[*New York Blues*] does not . . . signal a retreat from *Pilot Life*'s holding that the civil enforcement provisions of ERISA § 502(a) [29 U.S.C.A. § 1132(a)] were intended by Congress to be exclusive." *Id.* at n.3.

Following *Pilot Life*, the United States courts of appeals have consistently held that ERISA preempts state law fraud claims in cases alleging improper claims processing. *See, e.g., Farr v. US West, Inc.*, 58 F.3d 1361, 1366 (9th Cir. 1995); *Olson*, 960 F.2d at 1422-23; *Davidian v. Southern California Meat Cutters Union & Food Employees Ben. Fund*, 859 F.2d 134, 135 (9th Cir. 1988); *and see Shea v. Esensten*, 107 F.3d 625, 627 (8th Cir. 1997); *Anderson v. Humana, Inc.*, 24 F.3d 889, 892 (7th Cir. 1994); *Consolidated Beef Indus., Inc. v. New York Life Ins. Co.*, 949 F.2d 960, 964 (8th Cir. 1991), *cert. denied*, 503 U.S. 985 (1992); *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 979 (5th Cir. 1991).

The courts have specifically held state law fraud claims preempted where, as here, the statements in question were allegedly made "pre-contract," or prior to plaintiff's becoming a participant in the plan. In *Olson*, for example the Ninth Circuit held ERISA preempted plaintiff's claim that he was induced to take a job on the basis of fraudulent statements concerning the benefits he would receive. (*See Olson*, 960 F.2d at 1419-22.) Similarly, the court held ERISA preempted the *Davidian* plaintiff's claim that he would have elected other coverage had he not been misled as to the plan's reimbursement limits. (*See Davidian*, 859 F.2d at 134-35.)

The complaint at issue here sought damages arising from FHP's alleged delay in processing Steve Parrino's claim for medical benefits. In an effort to plead around ERISA, Petitioner included a claim for fraudulent inducement, alleging Steve would not have joined the plan had

he known how his claims would be processed.[4] But under this Court's decision in *Pilot Life* and the authorities cited above, a plaintiff cannot avoid ERISA by characterizing a utilization review claim as a claim for fraudulent inducement. Because such claims relate to plan administration and conflict with ERISA's exclusive remedial provision, they are preempted by ERISA. *See Pilot Life*, 481 U.S. at 42, 47, 52-57.

2. Petitioner's Argument Regarding An Inter-circuit Split Is Untimely And Incorrect. The Courts Of Appeals Agree ERISA Pre-empts State Law Fraud Claims Against ERISA Entities.

Petitioner contends there is a split of authority among the circuit courts that requires Supreme Court review. (*See* Petition at 5 and 9, alleging a "circuit split," *and see* Petition at 10, citing *Perkins v. Time Ins. Co.*, 898 F.2d 470 (5th Cir. 1990); *Coyne & Delany Co. v. Selman*, 98 F.3d 1457 (4th Cir. 1996); *Morstein v. National Ins. Servs.*, 93 F.3d 715 (11th Cir. 1996) (en banc), *cert. denied*, 117 S. Ct.

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[4] This claim, even if not preempted by ERISA, would have been properly dismissed on the merits. As a matter of law, Steve Parrino cannot have been "induced" to join the FHP Plan, as Petitioner claims. (See Petition at 3.) As explained above, he did not select the Plan. Rather, FHP entered into an agreement with Parrino Trucking, Inc., a business owned by Steve's father, Nick Parrino, to provide health benefits for its employees. Petitioner listed Steve as an employee on the Plan in order to obtain medical coverage for Steve's pre-existing cancerous condition. These facts do not give rise to a claim for fraudulent inducement.

769 (1997)). This purported split is based upon Petitioner's misreading of cases that (1) were never raised in his briefs to the Court of Appeals; (2) do not alter the result in this case; and (3) do not create an intercircuit split.

First, Petitioner waived any argument based upon these cases because he did not refer to them in his briefs in the Court of Appeals. *See Officers for Justice v. Civil Serv. Comm'n of the City & County of San Francisco*, 979 F.2d 721, 726 (9th Cir. 1992). Second, the cases cited by Petitioner hold that ERISA does not preempt fraud claims against *non-ERISA entities* such as insurance *agents*. *See Perkins*, 898 F.2d at 473 (5th Cir. 1990); *Morstein*, 93 F.3d at 722; *cf. Coyne*, 98 F.3d at 1470-71 [malpractice claim against insurance broker]. They affirm the rule that ERISA preempts fraud claims against ERISA entities such as insurers and plan administrators (like FHP). *See Perkins*, 898 F.2d at 473 ("ERISA clearly preempts [plaintiff's fraud] claims as they relate to [the insurer defendant]"); *Morstein*, 93 F.3d at 723 & n.11; *Coyne*, 98 F.3d at 1470-71. Under these cases, Petitioner's claims against FHP, an ERISA plan administrator, *are* preempted. Accordingly, they do not alter the result reached by the Court of Appeals.[5]

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[5] Plaintiff cites dicta in *Perry v. P*I*E Nationwide*, 872 F.2d 157 (6th Cir. 1989) to support his argument that ERISA does not preempt state law fraud claims alleging inducement to join a plan. (See Petition at 9-10.) But the Sixth Circuit has since clarified the dicta on which Petitioner relies in an opinion holding that ERISA preempts fraudulent inducement claims against an insurer. *See Massachusetts Cas. Ins. Co. v. Reynolds*, 113 F.3d 1450, 1454 (6th Cir. 1997). The *Reynolds* court rejected arguments, ostensibly based on *Perry*, that (1) claims regarding

Third, these cases do not create an intercircuit split. They simply hold that ERISA does not preempt state law claims against *non*-ERISA entities, a conclusion consistent with pre-existing case law and Ninth Circuit precedent. Because ERISA unquestionably preempts fraudulent inducement claims against ERISA entities like FHP, the Court of Appeals correctly affirmed the dismissal of Petitioner's complaint.

B. Certiorari Is Not Warranted On The Commercial Blockade Issue Because The Facts Do Not Give Rise To A Claim Under That Statute.

California's commercial blockade statute, California Civil Code § 3427.1, states that it is "unlawful . . . to intentionally prevent an individual from entering or exiting a health care facility by physically obstructing an individual's passage or by disrupting the normal functioning of a health care facility." Disrupting the normal functioning of a health care facility is defined as "intentionally rendering or attempting to render a health care facility temporarily or permanently unavailable or

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conduct occurring before the existence of an ERISA plan are excluded from preemption, and (2) ERISA does not preempt state law claims when there is no adequate remedy under ERISA. *See id.* at 1453-54 and n.2. In rejecting these arguments, the court explained that (1) *Perry*'s holding was limited to rescission and restitution claims, and (2) *Perry* did not hold that a gap in remedies allows plaintiffs to pursue state law claims. *Id.* (citing *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 943 n.5 (6th Cir. 1995) (a "gap" in remedies does not affect ERISA preemption)).

unusable by a licensed health practitioner, the facility's staff, or patients." *Id.* § 3427(c).

This statute has nothing to do with this case. Petitioner did not allege that anyone physically prevented Steve from entering or exiting a health care facility, or that any of the defendants disrupted the normal functioning of any such facility, let alone engaged in acts of "intimidation" or "violence." (See Petition at 19.)

Allegations of delay in the processing of medical benefits simply cannot be construed to constitute "commercial blockade" of a health care facility. Petitioner's efforts to evade ERISA preemption of such claims by citing an inapplicable statute were thus properly dismissed. Accordingly, ERISA preemption of the commercial blockade statute is not an issue properly before this Court.

C. The Remaining Authorities Cited By Petitioner Are Inapposite, Waived, Or Both.

1. The Remainder Of The Cases Cited By Petitioner Are Inapposite.

Petitioner cites to several medical malpractice cases in his Petition. (See Petition at 15-16, citing *Roessert v. Health Net*, 929 F. Supp. 343 (N.D. Cal. 1996), *Rice v. Panchal*, 65 F.3d 637 (7th Cir. 1995).) These cases do not apply to the case at hand. Petitioner did not allege medical malpractice or sue FHP on a theory of respondeat superior for an improper medical decision made by a treating physician, as did the respective plaintiffs in *Roessert* and *Rice*. In fact, Petitioner himself expressly

denied in his pleadings that FHP made any medical decisions: "At all times relevant herein, no physician employee of FHP nor any facility owned and operated by FHP ever rendered any medical, hospital, or other health care related professional service to [Steve Parrino]." (S.E.R. 43 at 6, ¶ 16.) Moreover, he denied having any complaint about the medical care Steve received through FHP at Loma Linda: "Plaintiff was, and continues to be, extremely grateful to Loma Linda and its physicians." (*Id.* at 9, ¶ 22.) Simply stated, Petitioner's complaint was not about the quality of the care Steve received; it was about the economic structure of the plan itself. As such, it was unequivocally preempted.

Petitioner's citation to *The Meadows v. Employers Health Ins.*, 47 F.3d 1006, 1009 (9th Cir. 1995) (Petition at 11-12), is also inapposite. There, the court held ERISA did not preempt independent claims brought against an insurer *by a third-party health care provider*. The court explained that because third-party health care providers have no right to sue under ERISA, ERISA would not preempt their action. *See id.* at 1008-10. Because Petitioner is a plan beneficiary, whose claims are clearly preempted by ERISA, this case does not apply.

2. The Statutes Cited By Petitioner Are Waived, Inapposite, Or Both.

Petitioner refers to a number of California statutes, including California Penal Code section 602.11, Business & Professions Code sections 145 and 510, and Welfare & Institutions Code section 14409. (See Petition at 2-3, 11.) Because he did not cite to any of these statutes in his

briefs in the District Court or in the Appellant's Opening Brief in the Court of Appeals, however, he has waived any arguments based upon them. *See Officers for Justice*, 979 F.2d at 726.

Petitioner's argument regarding the "savings clause" (Petition at 9) is also waived. While he made nominal reference to the savings clause in his Appellant's Opening Brief, he did not discuss the relevant section – ERISA § 514(b)(2)(A), 29 U.S.C.A. § 1144(b)(2)(A) – at all. In any case, the savings clause does not save Petitioner's claims from preemption. *See Pilot Life*, 481 U.S. at 48-52, 57; *Kanne v. Connecticut Gen'l Life Ins. Co.*, 867 F.2d 489, 494 (9th Cir. 1988), *cert. denied*, 476 U.S. 1170 (1989).

Finally, Petitioner refers to California Health & Safety Code section 1360, part of the Knox-Keene Health Care Service Plan Act (Cal. Health & Safety Code §§ 1340-1399.60) ("the Knox-Keene Act"). It is well-established that ERISA preempts this Act, which "directly regulates employee benefit plans." *Hewlett-Packard Co. v. Barnes*, 571 F.2d 502, 504 (9th Cir. 1978). In any event, because there is no private cause of action under the Knox-Keene Act, Petitioner's reference to it is inapposite. *See* Cal. Health & Safety Code § 1341 ("Responsibility for the administration and enforcement of this chapter is vested in the Commissioner of Corporations").

IV. CONCLUSION.

For all of the foregoing reasons, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Dated: October 14, 1998

Respectfully submitted,

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